90-1178

Supreme Court, U.S.
FILED
JAN 18 1991
JOSEPH F. SPANIOL, JR.
CLERK

*No.*

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**IN THE**
**Supreme Court of the United States**
**October Term 1991**

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JOHNNY OYOLA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the writ should be granted to correct an erroneous ruling on Petitioner's motion to suppress evidence?

2. Whether Petitioner was denied Due Process and a fair trial by the failure of the trial court to grant him a severance?

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the conviction of Johnny Oyola is set forth at Appendix A.

The order of Second Circuit denying the petition for rehearing is set forth in Appendix B.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit, affirmed petitioner Johnny Oyola's conviction on September 19, 1990. An order denying a timely petition for rehearing was entered on November 20, 1990. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment and Fifth Amendment to the United States Constitution and Rule 14 of the F.R.C.P. (See Appendix C)

## STATEMENT OF THE CASE

Chung Yang was arrested on April 26, 1989, after purchasing five "sham" units of heroin from undercover agents. Yang agreed to cooperate and told the agents that he was working with his partner, Bo Feng, and two Hispanic males who were the source of the money Yang had given the agents and who were waiting back at a house in the Bronx for the heroin. Under the agents' supervision, Yang then placed a number of beeper calls to his partner. He spoke in Cantonese to someone he referred to as "Simon," who confirmed that he was waiting for Yang

to return with the heroin. These conversations show that actually Feng was waiting with one Hispanic male.

Yang did not know the address in the Bronx where his partner was waiting, but was able to direct the agents to a house, which he described as a two story residence. In addition, Yang explained that there would be three cars at the house, a white Cadillac, a blue van and a police-type sedan. The agents arrived at the location at about 2:30 a.m. on the morning of April 27, 1989. DEA Agent Peter Amentas observed three cars in front of the house and three individuals, later identified as Bo Feng and Robert Felix and Johnny Oyola, standing by a fence in the front yard apparently looking around.

Amentas' vehicle drove around the corner and came back to the house. This time, Amentas noticed that Feng and Felix, still in the front of the house, appeared nervous and looked as though they were getting ready to flee. In addition, Amentas observed Oyola, who was standing in front of the building. The agents then arrested Feng and Felix outside the house and Oyola inside.

Oyola was arrested by Agent Peter Mitesser, who handcuffed Oyola and placed him on the floor. After the residence was secured, Mitesser moved Oyola to the living room and placed him on the couch. Mitesser then patted Oyola down and found various records in his pockets and wallet, including cardboard cards. The agents also found a black bag on the table in front of the couch. Various items, including additional cardboard cards and a receipt for a mobile telephone in the name of "Norma Oyola," were found in the bag. In addition, Oyola was wearing a beeper when he was arrested.

Mitesser then informed Oyola that he was under arrest for heroin trafficking and asked if he spoke English. When Oyola responded affirmatively, Mitesser read him his rights from a DEA rights card. Mitesser paused at the end of each paragraph to ensure that Oyola understood the rights that Mitesser was explaining to him. After each paragraph Oyola responded in the affirmative. When Mitesser arrived at the paragraph that concerned whether Oyola wanted to answer questions, Mitesser specifically asked if Oyola wanted to answer questions about the cardboard cards found in his pockets. Oyola responded that he did not know what the cards were and that he found them in the street. When Mitesser told Oyola that the cards looked like narcotics records, Oyola twice more repeated that he did not know what the cards were.

## REASONS FOR GRANTING THE WRIT

### A. THE WRIT SHOULD BE GRANTED TO CORRECT AN ERRONEOUS RULING ON PETITIONER'S MOTION TO SUPPRESS

In the opinion below, the panel overlooked a critical fact; that the taped telephone conversations between the cooperating co-conspirator, Yang, and his partner Feng, corroborated Yang's version of the events only to the extent of Feng waiting for him in the company of one Hispanic male. Indeed, the conversation, made the very day of the arrests, clearly establishis that Feng was waiting for Yang with one Hispanic male. The tape of that conversation (G.X.24, 24a)* refers to "he", "him", and

*Gov't. exhibits are identified as G.X. See also, GX 22, which is an earlier taped call between Poon ("Ah Min"), a government informant, and Yang ("Ah-Lang"), referring to the presence of only one non-Chinese: "the foreigner".

"Hispanic guy", all in the singular. Thus, while Yang had originally told the agents that two Hispanics were involved, the subsequent telephone conversations revealed that only one Hispanic male was with Feng.**

Indeed, the Second Circuit refers to the original information that two Hispanics were involved and that telephone calls were made by Yang to Feng, nowhere does the opinion refer to the fact that Feng said that he was waiting with only one Hispanic. Therefore, the corroboration supplied by the calls and by the verification of the location and the cars in front, add nothing to explain the presence of the second Hispanic.

Given that the neighborhood has a large number of Hispanics and that the premises was a two family home, the mere presence of Oyola in front of or near the door of the house does not supply probable cause, but, at most, reasonalbe suspicion.*

In this case, the agents immediately arrested Oyola, who was handcuffed, frisked and searched. Thus, full probable cause was required.

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**At trial, this one Hispanic male was identified by Feng and Yang as being co-defendant Felix.

*It must also be noted that there was some physical separation between Oyola and the others, since Agent Armentas testified that originally he saw three people in the front yard (at the time unidentified), but that a few minutes later, Oyola was at the door to the house, while Felix and Feng were still in the yard.

The Supreme Court has held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cuse to search that person." *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979). See also, *Maryland* v. *Buie*, _____U.S._____ 110 S.Ct. 1093, 1099 n.2 (1990).

In *Ybarra*, Ybarra was present in a bar at a time when probable cause existed to believe that the bartender had heroin to sell. That set of facts did not justify a search of Ybarra without individualized factors making out probable cause to search him. *Id.* at 91.

In *United States* v. *Patrick*, 899 F.2d 169, 171 (2d Cir. 1990), the Second Circuit distinguished *Ybarra* on the basis that more was known about Patrick than mere "propinquity", rather, there was clear evidence that he was traveling with a Mr. Taylor who was found in possessin of drugs. Here, there was no evidence or information at the time of Oyola's arrest to indicate that he had ever been with Feng and/or Felix. Up to the time of arrest, no one had identified Oyola as being involved in any of the narcotics transactions at issue. All that the agents knew before the arrest was that Oyola was present at a location and near people about whom the agents had information amounting to probable cause. As mentioned before, the premises in question was a two-family home in a neighborhood with a large Hispanic population. Thus, even if Oyola was in the yard at some time with Feng and Felix, and there is some doubt as to even this, still, shorn of window dressing, the information the agents had amounted to nothing more than the presence of a second Hispanic male, where only one was expected.

Accordingly, the Second Circuits's decision, which took no note of the fact that only one Hispanic male was to be present with Feng and which treated the corroborated information as of two such men would be present, was erroneous, and the motion to suppress should have been granted.

In light of the crucial role played by the unlawfully seized narcotics records, and the use of Oyola's post-arrest statements regarding that evidence as false, exculpatory statements, he should have been granted a new trial.

## THE DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO GRANT A SEVERANCE.

Rule 14 of the Fed.Crim.P., in pertinent part, states: "if it appears that a defendant is prejudiced by a joinder...of defendants...for trial together, the court may grant a severance of defendants or provide whatever other relief justice requires." Under this rule, the trial court has almost unlimited discretion to make a determination that a defendant's rights would be prejudiced by a joint trial. *Opper* v. *United States*, 348 U.S. 84 (1975). A trial court judge abuses this discretion when he denies a severance motion which results in a joint trial severely prejudicing a defendant such that it denies the defendant due process and a fair trial. *United States* v. *Burke*, 700 F.2d 70 (2d Cir. 1983). The standard the court must use in ordering a severance is whether the defendant has made the required showing that a joint trial would result in substantial prejudice, amounting to a 'miscarriage of justice'. *United States* v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989), *cert. denied*, _____U.S._____, 110 S.Ct. 1927 (1990). In the present case, the trial judge abused his discretion by denying Mr. Oyola's severance motion because the prejudice to

Mr. Oyola was so substantial, it created a miscarriage of justice, depriving Mr. Oyola of his constitutional right to due process and a fair trial.

A. *The Evidence Admitted Against Mr. Oyola's Co-defendant "Spilled Over" Against Mr. Oyola Causing Substantial Prejudice to Mr. Oyola.*

Substantial prejudice can arise in a severance context, when there is a transference of guilt from one defendant to another, or guilt by association, caused by the inability on the part of the jury to compartmentalize the evidence received against each defendant in view of some of the evidence's limited admissibility against only certain defendants. *United States* v. *Branker*, 895 F.2d 881 (2d Cir. 1968). In this case, evidence offered against Mr. Oyola's co-defendant directly "spilled over" against Mr. Oyola, causing him substantial prejudice resulting in a deprivation of his right to a fair trial.

During the trial, the prosecutor offered into evidence two prior similar acts of heroin trafficking against Mr. Oyola's co-defendant. Mr. Oyola was not involved in either of those two prior similar acts against his co-defendant. However, the co-defendant's prior similar acts of heroin distribution were patently entwined with the charges against Mr. Oyola. Moreover, the prosecutor's summation linked the two prior similar acts of heroin trafficking with the co-defendant's present charge. The prosecutor "harped" on this point so much during trial and summation, that it was bound to "spill over" and affect the jury concerning Mr. Oyola and the co-defendant's two prior similar acts of dealing heroin.

It is conceded that at the time the two prior similar acts of drug trafficking were offered, an objection was

made, and the judge gave the following limiting instruction:

"It applies only to Mr. Felix". (Tr. 278)

This mere limiting instruction, (which was not reinforced during prosecution's summation) could not have limited the bearing of evidence against Mr. Oyola. It has been held that if it is beyond the capacity of jurors to follow the Court's admonitory beyond the capacity of jurors to follow the Court's admonitory instructions and accordingly collate and appraise the independent evidence against each defendant solely upon the defendant's own acts, statements and conduct, then a severance must be granted. *United States v. Rosenwasser,* 550 F.2d 806 (2d Cir. 1977). *United States v. DeCicco,* 435 F.2d 478 (2d Cir. 1970). In *United States v. DeCicco* prior similar acts were offered against a co-defendant and the trial judge gave a limiting instruction to the jury which was more detailed than in the present case. That court held that the one time caution of the judge did not cure the prejudice imposed, and reversed the conviction. In the present case, there was a less detailed instruction and it was only given once. Surely, if the prejudice was not cured in *DeCicco*, it could not have been cured in this case. Thus, just as the court reversed conviction in *DeCicco*, the Second Circuit should have reversed the conviction of Mr. Oyola.

B. *The Defendant was Denied a Fair Trial When the Non-Testifying Co-Defendant's Admission Offered into Evidence Referred to and Implicated Mr. Oyola at Trial.*

In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Supreme Court held that in a joint trial, the admission of a non-testifying co-defendant's extra-judicial confession used against the co-defendant violates the defendant's right to confrontation if the confession also incriminates the

defendant. The Supreme Court states a remedy to such a problem is the severance of defendants. Another remedy to this confrontation clause problem is to redact the name of the defendant and *any reference* to the defendant. *Richardson* v. *Marsh*, 481 U.S. 200 (1987). In the present case, Mr. Oyola was substantially prejudiced when his co-defendant's confession, despite being redacted as to Mr. Oyola's name, made reference to Mr. Oyola and thus incriminated Mr. Oyola, depriving him of a fair trial.

During the prosecutor's direct case, Agent Connelly testified that the co-defendant confessed to his role in the drug transaction as the provider of "transportation and security". However, the agent also added that the co-defendant said "he had done one or two prior deals of this variety with the "same players". At this point, Mr. Oyola's trial counsel objected, but was overruled (Tr. 507-509).

The agent's recitation of the co-defendant's confession was facially incriminating against Mr. Oyola. A co-conspirator's own testimony identified himself as one of those "same players" in the prior and present transaction, leaving Oyola and another co-conspirator to satisfy those being players in the transaction. But the co-defendant first met the other conspirator after the prior heroin transactions were completed as was shown by the co-conspirators own testimony. Consequently, the sole person who could fill the role of the other players in the prior and present transaction was Mr. Oloya. As a result, jurors were left to conclude that Mr. Oyola was one of the "same players" in the prior and present transaction.*

*Agent Connelly was the last government witness. Thus his recitation of co-defendant's confession and admission did not become prospectively inculpatory by being linked with evidence later introduced at trial but was rather retrospectively inculpatory. *Richardson v. Marsh, supra.*

In *United States* v. *Pickett*, 746 F.2d 1129 (6th Cir. 1984) *cert. den.* 469 U.S. 1226 (1985), the court held that there was a violation of *Bruton* when a co-conspirator's redacted statement as reported by an FBI agent, who substituted "the individual" for defendant's name, because circumstances compelled an inference that the redacted statements referred to the defendant. In *United States* v. *Bennett*, 848 F.2d 1134 (11th Cir. 1989), the court held when an agent continously repeated references to "they and them" in a defendant's redacted statement, it could only be reasonably understood as referring to the defendant and was a violation of *Bruton*.

In *United States* v. *Danzey*, 594 F.2d 905 (2d Cir. 1979), the jury was able to fill in the name of the defendant when the agent reported a co-defendant's confession and substituted the defendant's names with "nine males", and thus was a violation of *Bruton*. In this case, the jury was clearly able to fill in Mr. Oyola's name as one of the "players" referred to by Agent Connelly. Thus, just as *Bruton* violation existed in *Pickett, Bennett* and *Danzey*, a *Bruton* violation must have existed in Mr. Oyola's case.

As a result of the evidence admitted against the co-defendant "silling over" to Mr. Oyola and the *Bruton* violation, Mr. Oyola was severely prejudiced and denied a fair trial.* In *United States* v. *Papadakis* 510 F.2d 287 (2d

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*Both of these errors reached its highest prejudicial points during the prosecutor's summation, when both the prior similar acts and fruits of the *Bruton* violation were used in tandem. The prejudice was compounded by the prosecutor's unqualified statement in summation that after the co-defendant's arrest, Oyola told the agent "my job was security and transportation" (Tr. 688). This blanket statement when coupled with the "same players" testimony, allowed the jury to conclude that the co-defendant had the identical role on two prior deals with Oyola that he had in the present deal with him.

Cir. 1975), the court explained that these types of prejudice are certain to occur in joint conspiracy trials, and that each defendant is to be protected and the obvious dangers minimized by clear rulings on admissibility, limitations of the bearings of evidence as against particular individuals, and adequate instructions. When these safeguards are not executed or exercised, then it becomes incumbent upon the court to grant relief from this prejudicial joinder. *Blumenthal* v. *United States*, 332 U.S. 539 (1947).

In the present case, Mr. Oyola's safeguards were nonexistent. The *Bruton* violation, admission of prior similar acts, and inadequate limiting instructions resulted in substantial prejudice amounting to a miscarriage of justice. This deprived Mr. Oyola of due process and a fair trial.

## CONCLUSION

THE WRIT SHOULD BE GRANTED

Respectfully submitted,

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## APPENDIX A—OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of September, one thousand nine hundred and ninety.

PRESENT:
HONORABLE GEORGE C. PRATT,
HONORABLE J. DANIEL MAHONEY,
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.

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UNITED STATES OF AMERICA,
Appellee,

-against-

ROBERT FELIX AND JOHNNY OYOLA,
Defendants-Appellants.

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Nos. 90-1197, and 90-1237

This appeal from two judgments of conviction of the United States Districe Court for the Eastern District of New York, Eugene H. Nickerson, *Judge*, came on to be heard on the transcript of the record and was argued.

**ON CONSIDERATION WHEREOF,** it is now ordered that the judgments of conviction are affirmed.

Robert Felix and Johnny Oyola were convicted by a jury of conspiring to possess and distribute heroin and of attempting to possess and distribute heroin, in violation of 21 U.S.C. %§ 841(b)(1)(A)(i) and 846. Felix was sentenced to two concurrent prison terms of 151 months; Oyola was sentenced to two concurrent prison terms of 188 months. On appeal, Oyola argues that there was no probable cause for his arest; that his trial should have been severed from Felix's trial; and that his trial was prejudiced by the prosecutor's summation. Felix contends that he was denied a fair trial because his counsel's cross-examination of an informant was improperly restricted and that he should have been granted a mistrial based on the late discovery and disclosure of a government agent's notes.

Law enforcement agents have probable cause to arrest a suspect if they have information supporting a reasonable belief that the suspect has committed or is committing a crime. *United States v. Fisher*, 702 F.2d 372, 375 (2d Cir. 1983). Prior to Oyola's arrest, government agents arrested a man for attempting to buy heroin from them. He agreed to lead them to the house where his accomplices, two Hispanic men and an Asian man, were waiting for him to return with the heroin. The agents taped a few phone calls the informant made to his accomplices, confirming his return. Around 2:30 a.m., he took the agents to a house where three cars were parked and they saw in the front yard or near the house two Hispanics and an Asian. One of the Hispanics was Oyola. The informant's information, corroborated by the phone calls and by the agent's own verification of the previously describ ed location, provided probable cause to believe that Oyola had been part of the heroin transaction, and to arrest him.

Despite various arguments, Oyola was not entitled to severance of his trial. First, "similar act" evidence of Felix's two prior heroin deals did not unfairly prejudice Oyola's case: the evidence was offered to show the background of the conspiracy, not to show similar acts; the informant testifying to the prior deals also testified that they did not include Oyola; the trial court instructed the jury that the evidence applied only to Felix; and such evidence is generally admissible in joint trials. *United States v. Reed*, 639 F.2d 896, 907 (2d Cir. 1981); *United States v. Lyles*, 593 F.2d 182, 190-91 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979). Second, Oyola was not prejudiced b Felix's confession to this deal as well as two prior deals, or by a government agent's testimony that the deals involved "the same players": Felix's confession had been redacted to omit any mention of Oyola; the agent immediately clarified that "the same players" did not include Oyola; and Oyola's counsel refused the court's invitation to move for a mistrial, and he did not request one at the close of the case.

Third, Oyola's defense and Felix's defense were not so antagonistic that acceptance of one by the jury required it to disbelieve the other; thus, the joint trial did not prejudice Oyola's defense, *United States v. Tutino*, 883 F.2d 1125, 1130 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1139 (1990); *United States v. Alvarado*, 882 F.2d 645, 656 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990). Oyola argued that agents confused him with his brother, impoying that his brother was the perpetrator; Felix also tried to divert blame to his own brother; both urged that the government agents and informants fabricated or lied about the evidence; and neither blamed each other. In sum, none of these comlaints created sufficient prejudice to require severance. *See United States v. Burke*, 700 F.2d 70, 83 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983).

To deny a defendant a fair trial, the prosecutor's summation must be so improper as to cause substantial projudice. *United States v. Casamento*, 887 F.2d 1141, 1189 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1138 (1990); *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987). First although the prosecutor may not tell the jury that if it acquits the defendant, then it believed the government was lying, *United States v. Richter*, 826 F.2d 206, 209 (2d Cir. 1987), the prosecutor, as in this case, may rebut attacks on the integrity of the government's case, *United States v. Praetorius*, 622 F.2d 1054, 1060 (2d Cir. 1979), *cert. denied*, 449 U.S. 860 (1980), or raise the issue of the credibility of the defendant's testimony. *United States v. Durrani*, 835 F.2d 410, 424 (2d Cir. 1987). Second, it was not improper for the prosecutor to argue to the jury that Oyola wanted it to believe that his brother was the perpetrator, since Oyola's testimony implied it. Third, the prosecutor's simplified review of the evidence regarding the various descriptions of Oyola's car was not improper because the suggestion that the various descriptions were of the same car was reasonable. *Casamento*, 887 F.2d at 1189; *Nersesian*, 824 F.2d at 1327. In short, even if some of the prosecutor's statements were irregular, any harm that might have occurred did not amount to substantial prejudice, in light of the abundant evidence supporting Oyola's conviction. *See Casamento*, 887 F.2d at 1191; *Nersesian*, 824 F.2d at 1327.

Next, the district court reasonably restricted Felix's cross-examination of an informant. It refused to allow extended questioning of the witness about his possible deportation, after he admitted that he had continued questioning of that witness about the sentence he faced under the guidelines, after he described the cooperation agreement he had with the government and testified that he did

not understand how the guidelines worked. Moreover, even if the court had erred, such error would have been harmless, because the jury had sufficient information to evaluate the informant's motives for testifying. *United States v. Singh*, 628 F.2d 758, 763 (2d Cir.), *cert. denied*, 449 U.S. 1034 (1980).

Finally, a mistrial is declared only when, considering all the circumstances, there is a manifest necessity for it, or the ends of justice require it. *United States v. Klein*, 582 F.2d 186, 190 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). After opening statements, the government found notes about Felix's post-arrest statement, taken by the case agent, and turned them over to Felix. Since the trial was in its early stages, since the notes did not undermine Felix's opening argument, and since the court advised that it would allow cross-examination of the agent about the notes, the late production of the notes was not so prejudicial as to require a mistrial.

s/ George C. Pratt
George C. Pratt, U.S.C.J.

s/ J. Daniel Mahoney
J. Daniel Mahoney, U.S.C.J.

s/ John M. Walker
John M. Walker, Jr., U.S.C.J.

*N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.*

## APPENDIX B
## ORDER ON MOTION FOR REARGUMENT

United States Court of Appeals
for the
Second Circuit

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of November one thousand nine hundred and ninety.

Present: Hon. George C. Pratt
Hon. J. Daniel Mahoney
Hon. John M. Walker, Jr.
Circuit Judges,

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United States Of America,

Appellee,

v

Robert Felix and Johnny Oyola,

Defendants-Appellants.

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Docket No. 90-1197

A petition for a reharing having been filed herein by Appellant Johnny Oyola.
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

## APPENDIX C—STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide

whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.